(1) Supreme Court, U.S.
FILED

001525 JAN 30 2001

OFFICE OF THE CLERK

NO.

In The
SUPREME COURT OF THE UNITED STATES

Charles E. Duncan Jr.
Petitioner

vs.

Workers Compensation Appeals
Board of the State of California and
Steve Schmidt Esq., Lien Claimant
Respondents

On Petition for Writ of Certiorari
To the California Supreme Court

PETITION FOR WRIT OF CERTIORARI

Kenneth Crews Mann, Attorney at Law,
A Member of the Bar of this Court,
Counsel of Record
14626 Greenleaf Street
Sherman oaks, CA 91403-4124
818 906 2266

37pp

Questions Presented for Review Rule 14.1a

Introductory Statement

Petitioner Charles E. Duncan Jr., born May 16, 1943, while employed as a carpet installer at Los Angeles, California, by Jim's Carpet Service, insured for workers compensation insurance by Zenith Insurance Company, sustained an injury arising out of and occurring in the course of employment to his neck and psyche.

The injury caused permanent disability of 100% payable at the rate of $336.00 per week for life. The Worker's Compensation Judge awarded an attorney fee for Petitioner's attorney of $25,000 to be taken at the far end of the award. This was done on May 12, 1998. See Appendix EXHIBIT C.

Two years later on May 10, 2000, Administrative law judge Harvey Stark, acting without notice, used a new formula for computing the attorney fee award, basing it entirely on a new unpublished opinion decided May 19, 1999, one year after Petitioner's attorney fee award, which substantially changed the formula for computing the fee, using present value of the Workmen's Compensation Award, not the far end, to compute the award and increased the fee from $25,000 to $31,000. See appendix EXHIBIT P dated May 10, 2000.

This act alone violated the Constitutional rights of Petitioner, took his beneficial property interest in the $25,000 attorney fee award away from him and without the constitutionally required hearings. It was admittedly based on an unpublished opinion, which under California and Federal law is not citable as authority.

All of Petitioner's attempts to get a court hearing to complain and correct the unconstitutional acts by the trial judge and appeals board were ignored. See Appendix EXHIBITS J, K, L, M.

QUESTIONS PRESENTED

1 Can the WCAB by Harvey Stark, referee, re-compute an attorney fee award ordered May 12, 1998 by use of a subsequent unpublished opinion which changed the law of computing his $25,000 award and change it to $31,000?

1.1 Can the lower court use an unpublished, non citable opinion Earl Lambert vs. WCAB 64CCC637 May, 1999 not compute the fee at the far end of the award as was ordered May 12, 1998 but instead compute the fee using the present value of his Workmen's Compensation award?

1.2 Does not this the taking of property without due process of law by using a different test by use of an unpublished, non citable Lambert opinion violate Petitioner's due process rights?

1.3 Whether Petitioner's beneficial interest in the lower attorney fee, being property under California law, may be taken from the Petitioner without due process of law in violation of the U. S. Constitution and Cal. Ct. Rule 977?

1.4 Can this be done even though that taking of the property right from Petitioner was for a public purpose, that of modifying the statute by judicial fiat for assessing attorney fees under Workmen's Compensation laws?

1.5 Did not this taking allow the public assessment of attorney fees in workmen's compensation cases to be modified, with a new formula now a part of a new law obtained by judicial fiat, by use of an unpublished opinion in violation of Constitutional due process and California law Court Rule 977?

1.6 Can the Separation of Powers doctrine be violated by legislative action by the judiciary?

1.7 Can Petitioner complain that the court cited an unpublished opinion to change the law when other California law says "Our state rules of court bar us from citing or relying on unpublished opinions" in Waranch v. Gulf Insurance Co. 218 Cal.App.3d 356, *357Feb 27, 1990.FN1?

1.8 Can the Due Process Clause be invoked to insure that state-created right is not arbitrarily abrogated by the judge, the appellate court and the California Supreme Court?

1.9 Should not the respondent trial judge, and Court, and the Court of Appeals and the California Supreme Court have protected the rights of Petitioner to due process, equal protection of the laws, the Federal Constitution, not allow the taking of his property rights in an award of $25,000 attorney fees entered by order May 12, 1998 ?

1.10 Were the trial court and division 2 of the 2nd appellate District of the Court of appeal the California Supreme Court all guilty of wrongly, unconstitutionally allowing use of an unpublished opinion retroactively two years later?

1.11 Whether the law, U.S. Supreme Court Saunders v Shaw (1917)37 Sup Ct 638, holding that an appeals court can by its own acts violate the due process rights of an appellant and Lyydikainen v Ind. Acc. Comp. (1939) 36 CalApp2d 298, can be ignored along with the stare decisis doctrine?

TABLE OF CONTENTS

Introductory statement	i
Questions Presented	ii iii
Text of the Petition	1
Opinions Below	1 2
Jurisdiction	1, 2, 3,4,5,6
Statement of the Case	6
Constitutional provisions involved	5
Direct concise argument	10
Conclusion	16
Proof of Service by Mail	
Appendix	Page 19 through page 30

TABLE OF AUTHORITIES CASES

In re Antablian, Bkrtcy.C.D.Cal.1992, 140 B.R. 534.
CA ST MISC. Rule 977 9
Case: Bush v. Gore, equal protection clause.
The United States Supreme Court, -Supreme Court, --- U.S. ----, 121 S.Ct. 512, --- L.Ed.2d ----, 2000 WL 1801819,-- 3, 10
In re Marriage of Barnes Excerpt from: 43 Cal.3d 1371, *1372 Supreme Court of California. Oct. 29, 1987. 2 11
Burnett v King (1949) 33 Cal2d 805, 807, 205 P2d 657 11
Blumenthal v. Di Giorgio Fruit Corp.
(App. 1 Dist. 1938) 30 Cal.App.2d 11, 85 P.2d 580. 12
Dash Inc. v Alcoholic Beverage Control Appeals Bd.
683 F2d 1229; 14
Department of Motor Vehicles of State of
Cal. v. Rios, U.S.Cal.1973, 93 S.C. 1019, 410 U.S. 425,
35 LED.2d 398, on remand 509 P.2d 696,
107 Cal.Rptr. 784, 9 Cal.3d 454. 4
Earl Lambert vs. WCAB 64CCC637 May 1999
(unpublished) 3,4, 7, 10, 11, 13,16
Faitz v. Ruegg (1981) 114 Cal.App.3d 967, 970
[171 Cal.Rptr. 149]; 8
Fuentes v. Shevin Excerpt from: 407 U.S. 67, 92 S.C. 1983
92 S.C. 1983 12
Heaton v. Marin County Emp. Retirement Bd.,
Marin County (App. 1 Dist. 1976) 133 Cal.Rptr.
809, 63 Cal.App.3d 421. 9
Lyydikainen v Ind. Acc. Comp. (1939)
36 CalApp2d 298; 3, 14, 15,16
Lorenz v. Lorenz (App. 2 Dist. 1983)
194 Cal.Rptr. 237, 146 Cal.App.3d 464. 8
Minnesota v. Clover Leaf Creamery Co.,
U.S.Minn.1981, 101 S.C. 715, 449 U.S. 456,
66 LED.2d 659, rehearing denied 101 S.C. 1735,
450 U.S. 1027, 68 LED.2d 222, on remand
304 N.W.2d 915. 28 USCA s 1257 5

Nash v. Florida Indus. Commission, U.S.Fla.1967,
88 S.C. 362, 389 U.S. 235, 19 LED.2d 438,
conformed to 205 So.2d 700. 28 USCA s 1257 5
People v. Superior Court (Clark) (App. 4 Dist. 1994)
28 Cal.Rptr.2d 46, 22 Cal.App.4th 1541. 8
R&P Capital Resources, Inc. v. California State Lottery
(App. 3 Dist. 1995) 37 Cal.Rptr.2d 436, 31 Cal.App.4th
1033. 8
US Mass 1979 USCAConstAmend. 14. Personnel
Adm'r Mass v Feeney 1699 S Ct. 2282, 442 US 256,
60 LEd2d 870 remand, affirmed 100 S Ct. 1075; 10
U.S. Supreme Court. Saunders v Shaw (1917)
37 Sup Ct. 638, . 14,1516
Zmuda v C.I.R. 731 F2s 1417 C.A.9 1984 13, 15

STATUTES

28 U.S.C. § 1257 1,4,5
SC Rule 13. 1
Rule 10(b) &(c) 1
The Due Process Clause of the United States Constitution,
taking of property without due process of law,
1,2,4,5,6,7,11,12.13,14,15,16,17
Equal protection clause of the
U S Constitution, 2,3,4,5,6,10,17
Separation of powers doctrine, 2,3,8,16,17
California Rule of Court 977 1,2,3,6,7,8,9,10,14,17
Labor Code § 4903, 4903.2 1,3,4
CA PENAL s 13830 8,9,17
CA CONST Art. 3, s 3 4,8,16
U.S.C.A. Const. Amend. 14 1,4,6,12,13,14,15,17
National Labor Relations Act, section 151 et seq.Tit29 5
Cal Civil § 663. Personal property defined 12
USCAConstAmends 5, 15
FCL CT Rule 52.1 9
CTA4 Rule 36(c) Citation of Unpublished Dispositions 9

TEXT OF THE PETITION

2 CONSTITUTIONAL JURISDICTION

We are reviewing the unconstitutional failure of the California Courts to follow constitutional law. Rule 14 (g) Failure of the State Courts including California Supreme Court gives this court jurisdiction for this Petition for Certiorari.

2.1 The Court of Appeal denied petition for hearing request, 10/2/2000. See Appendix EXHIBIT 2 That petition raised Constitutional issues including deprivation of his property without due process of law, in violation of § 4, Article XIV and § 1, Article III of the California Constitution and Violation of § 1 of the 14th Amendment to the U.S. Constitution. See Appendix EXHIBIT X

2.2 The opinion of the California Supreme Court denying review was filed November 15, 2000. This petition is being filed less than 90 days thereafter. See Appendix EXHIBIT 1. That Petition raised constitutional issues including no Adequate notice violates due process, U.S. Constitution 5th and14th Amendment, and taking of property without due process of law, and violation of equal protection of the law. See Appendix EXHIBIT 1A.

2.3 Jurisdiction of this Court is invoked under 28 U.S.C. § 1257 and SC Rule 13. and Rule 10(b) &(c), The Due Process Clause of the United States Constitution, taking of property without due process of law, equal protection clause of the United States Constitution; Judicial fiat arbitrarily changed an order two years after its rendition, by using an unpublished opinion which violated California Rule of Court 977, an unpublished judicial opinion which modified Labor Code § 4903, figuring the attorney fee from Petitioner's workmen's compensation award by totaling it and granting the fee on the present total, raising the fee over the original award from $25,000 to $31,000. The original award of $25,000 was to be paid from the far end of the award. See Appendix EXHIBIT C. The trial court and division 2 of the 2nd appellate district of the Court of appeal the California Supreme Court all guilty of

wrongly, unconstitutionally allowing use of an unpublished opinion retroactively two years later, use changed law of an unpublished opinion decided May 19, 1999, used in the order of May 10, 2000 taking Petitioner's property right in the $25,000 award and changing it to $31,000 and changing the manner of computation, not at the far end but at present value of the award, all ignoring the enactments of the California legislature, by judicial fiat violate the California Constitution, The Federal Constitution and California Ct. Rule 977, the United States Constitution. Due Process and Equal protection clauses, the separation of powers doctrine.

3 Constitutional violations authorize certiorari: Retroactive application of a statute may violate a party's due process rights if it deprives him or her of a vested property right without sufficient justification. Case: In re Marriage of Barnes Excerpt from: 43 Cal.3d 1371, *1372 Supreme Court of California. Oct. 29, 1987.

4 Failure of the Board to address issues raised in Petitioner's original and final petition for reconsideration or any of his motions or give him a chance to object to the use of the said unpublished opinion the denial of petitioners constitutional right to due process and equal protection, depriving Petitioner of a fair hearing before taking his property, a meaningful opportunity to fully and fairly litigate his claims and to have the matter determined on the merits raised in the final petition for reconsideration Appendix EXHIBIT X. And then ruling without any hearing or notice that his vested property right in the May 12, 1998 attorney fee award of $25,000, was going to be changed two years later on the basis of new law in an unpublished opinion changing his $25,000 attorney fee and the Labor Code formula used to decide it in 1998 violates his right to due process and equal protection.

4.1 Constitutional violations authorize certiorari.

5 The U S Supreme Court recognizes a citizen's right to protection of the federal constitutional right to equal

protection of the law. Equal protection was showcased in the following opinion. It was clear to the Court that no standard re counting of ballots represented a violation of the equal protection clause. In the case Bush v Gore, the United States Supreme Court, -- U.S. ----, 121 S.Ct. 512, --- L.Ed.2d ----, 2000 WL 1801819, granted application, treating it as petition for writ of certiorari, and granted certiorari. The Supreme Court held that: (1) manual recounts ordered by Florida Supreme Court, without specific standards to implement its order to discern "intent of the voter," did not satisfy minimum requirement for non-arbitrary treatment of voters necessary, under Equal Protection Clause, to secure fundamental right to vote for President, and (2) remand of case to Florida Supreme Court for it to order constitutionally proper contest would not be appropriate remedy. Case: Bush v. Gore Excerpt from: In the present case, the indiscriminate use of an unpublished opinion retroactively, to take property of the Petitioner represents a violation of the equal protection clause of the U.S. Constitution too. Certainly as in the Bush v Gore case as you found jurisdiction for certiorari, here in another State matter you can find the same jurisdiction to allow the writ of certiorari. Other bases for jurisdiction allow certiorari:

The Labor Code § 4903.2 existed at time attorney fee order was granted, yet almost two years later in violation of California Rule 977 that unpublished opinions in California may not be followed, judge followed one Earl Lambert vs. WCAB 64CCC637 See Appendix EXHIBIT C1 decided one year after Petitioner obtained his award of $25,000 and thereby acted as the legislature changing said Labor Code Section violation of the separation of powers doctrine,[1] allowing

---

[1] § 3. Enumeration; exercise

Sec. 3. The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.
CA CONST Art. 3, s 3

assessment of a higher attorney fee and this was done behind the back of Petitioner. Not granting him a hearing violated Due process of the California and United States Constitutions, and took his property right in first attorney fee decision which was a benefit, by assessing substantially more in attorney fees against Petitioner by the aforesaid actions and gave retroactive effect by said unpublished opinion and modification of said Labor Code statute formula Labor Code §§ 4903,4906.

5.1 See Appendix EXHIBIT V where judge Stark below relies on the unpublished opinion Earl Lambert v WCAB May 1999 basing the attorney fee on the full present value, not the far end value decided in May 12, 1998. 28 USCA s 1257

6 Where it could not be determined whether the Calif. Supreme Court in holding that prior to suspension of motorist's license under financial responsibility law, West's Ann. Vehicle Code, § 16000 et seq. motorist was entitled to hearing, based its holding upon the due process clause of U.S.C. Const. Amend. 14 or upon the equivalent provision of the California Constitution or both, State's petition for certiorari would be granted, judgment would be vacated and case remanded. Department of Motor Vehicles of State of Cal. v. Rios, U.S.Cal.1973, 93 S.C. 1019, 410 U.S. 425, 35 LED.2d 398, on remand 509 P.2d 696, 107 Cal.Rptr. 784, 9 Cal.3d 454.

6.1 In our case, it cannot be judged from the record whether the California Supreme Court based its rejection of review on the U.S. Constitution and provisions or the California Constitution and provisions. So certiorari should be granted.

7 Other cases show jurisdiction for Petitioner:

Standard of review under equal protection rationality analysis, without regard to which branch of state government has made the legislative judgment, is governed by federal constitutional law, and a state court's application of that standard is fully reviewable in the Supreme Court in writ of

certiorari. Minnesota v. Clover Leaf Creamery Co., U.S.Minn.1981, 101 S.C. 715, 449 U.S. 456, 66 LED.2d 659, rehearing denied 101 S.C. 1735, 450 U.S. 1027, 68 LED.2d 222, on remand 304 N.W.2d 915. 28 USCA s 1257

7.1 Petitioner here raised the equal protection argument in his petition to the California Supreme Court. The California Supreme Court rejected it. See Appendix EXHIBIT 1. and his petition for review, appendix EXHIBIT 1A.

8 Certiorari was granted because of important constitutional question of whether ruling of Florida Industrial Commission Unemployment Compensation Board of Review that Florida can refuse to pay unemployment insurance to persons solely because they have preferred unfair labor practice charges against their former employer violates supremacy clause of U.S.C.A. Const. Art. 6, cl. 2 because it allegedly "frustrates" enforcement of National Labor Relations Act, section 151 et seq. of Title 29. Nash v. Florida Indus. Commission, U.S.Fla.1967, 88 S.C. 362, 389 U.S. 235, 19 LED.2d 438, conformed to 205 So.2d 700. Also does 28 USCA s 1257.

8.1 Jurisdiction Exists to Hear this Petition for Certiorari.

9 Rule 14 (f) The constitutional provisions, statutes ordinances and court rules involved in this case are:

(1) Clause 7. Due process or be deprived of life, liberty, or property without due process of law. Complete Text of § 15, see Art. 1, § 15, without any clause designation. California Constitution, Art. 1, s 15, cl. 7;

(2) Cal.Const. Art. 3, § 3. Enumeration; exercise Sec. 3: The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others . . . .

(3) Cal Rule of Ct. Rule 977; "Publication status: Opinion not published in official reports and therefore not citable in judicial actions or proceedings."

(4) Federal Rules on unpublished opinions FCL CT Rule 52.1. Disfavored under Federal Law. CTA4 Rule 36(c) Citation of Unpublished Dispositions: . . . this Court will not cite an

unpublished disposition in any of its published opinions.
(5) 28 USCA § 1257. State courts; certiorari. a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari.
(6) Equal protection of the laws * * * nor deny to any person within its jurisdiction the equal protection of the laws. For complete text of Amend. XIV, see USCA Const Amend. XIV-Full Text USCA CONST Amend. XIV, s 1-Equal Protect
(7) USCA CONST Amend. XIV, s 1-Due Proc. Gen. Section 1. Due process of law in General * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * * For complete text of Amend. XIV, see USCA Const Amend. XIV-Full Text
(8) Code Title 8, Reg 10414, 10416, Cal Labor Code 134 Notice requirements and contempt for violation thereof.

10 STATEMENT OF THE CASE RULE 141(g)

Petitioner had a property right in his $25,000 attorney fee award. Two years after said order, without notice the lower court took that right from him and ordered a higher attorney fee award formulated on a new formula and supported that taking of Petitioner's benefit of a lower attorney fee, on authority of an unpublished opinion[2] decided one year after original attorney fee order. Furthermore, that unpublished opinion on the face of said opinion at its beginning stated it was not to be cited under authority of Cal Ct. Rule 977.[3] That

---

[2]Case: Waranch v. Gulf Insurance Co.
Excerpt from: 218 Cal.App.3d 356, *357Feb 27, 1990.FN1 We decline to analyze the unpublished Ohio Court of Appeals decision cited by appellants. Our state rules of court bar us from citing or relying on unpublished opinions. .

[3]"Publication status: Opinion not published in official reports and therefore not citable in judicial actions or proceedings. See Cal Rules of Ct. Rule 977."

taking of the property right from Petitioner was for a public purpose, that of modifying the statute by judicial fiat for assessing attorney fees under Workmen's Compensation laws. This taking allowed the public assessment of attorney fees in workmen's compensation cases to be modified, with a new formula now a part of a new law obtained by judicial fiat, by use of an unpublished opinion in violation of California due process and California law Ct. Rule 977. Unpublished opinions cannot be relied on for authority. The law says Petitioner can complain since the Due process clause may be invoked to insure that state-created right is not arbitrarily abrogated. People v. Sutton 2 (App. 3 Dist. 1993) 23 Cal.Rptr.2d 632, 19 Cal.App.4th 795. CA CONST Art. 1, s 15, cl. 7 Courts § and the Doctrine of Stare Decisis. Unpublished Opinions rules support Petitioner, since Unpublished opinions are not to be cited or relied on.

11 Petitioner had tried to get a continuance which was refused. See Appendix EXHIBIT O He was without counsel and believed the judge was going to re-figure the attorney fee award, and ignore the 5/12/98 award. In truth and fact the judge used a new opinion an unpublished opinion. See Appendix, EXHIBIT P where the unpublished unconstitutional use of the Lambert opinion by the judge re-computed the attorney fee award. No time for hearing on that use was given to the Petitioner. Later the court issued another document MAY 30, 2000 admitting it had relied on the unpublished opinion of Lambert. See Appendix EXHIBIT V P2 last paragraph: "in determining the reasonable attorney fee of Mr. Schmidt I relied on the case of Earl Lambert v WCAB (May 1999) 64CCC 627." In that unpublished opinion it expressly stated at the heading that it could not be cited as authority, Cal Ct Rule 977. "Publication status: Opinion not published in official reports and therefore not citable in judicial actions or proceedings. See Cal Rules of Ct. Rule 977."

11.1 This unpublished case mandated that the award of attorney fees be based on the full present value of applicant's award. The court using this unpublished case to modify the statutory rule for computing attorney fees was a legislative act, a change in the statute for computing attorney fees actually violating the separation of powers doctrine.

"a) The California court system has a constitutionally established independence under the judicial and separation of power clauses of the State Constitution." CA PENAL s 13830

"§ 3. Enumeration; exercise Sec. 3. The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

CA CONST Art. 3, s 3

11.2 Case: Waranch v. Gulf Insurance Co.

Excerpt from: 218 Cal.App.3d 356, *357Feb 27, 1990.FN1:

We decline to analyze the unpublished Ohio Court of Appeals decision cited by appellants. Our state rules of court bar us from citing or relying on unpublished opinions except as necessary to apply res judicata or collateral estoppel principles. (Cal. Rules of Court, rule 977.) Outside of this narrow exception, unpublished opinions have no precedential value in this state. (Faitz v. Ruegg (1981) 114 Cal.App.3d 967, 970 [171 Cal.Rptr. 149]; cf. rule 2 (G) (1)-(2), Ohio Supreme Ct. Rules for the Reporting of Opinions.)

12 Other authority that unpublished opinions not citable:

"It is error to cite on appeal a decision which had been ordered not published in the official reports." Lorenz v. Lorenz (App. 2 Dist. 1983) 194 Cal.Rptr. 237, 146 Cal.App.3d 464.

"Orders or decisions which are not published cases are not properly citable as authority." R & P Capital Resources, Inc. v. California State Lottery (App. 3 Dist. 1995) 37 Cal.Rptr.2d 436, 31 Cal.App.4th 1033.

"Unpublished opinion may not be relied upon by party." People v. Superior Court (Clark) (App. 4 Dist. 1994) 28 Cal.Rptr.2d 46, 22 Cal.App.4th 1541.

CA ST MISC. Rule 977

"Fact that issues raised in appeal were rejected by court of appeal in prior unpublished opinion did not require that appellant be penalized for taking frivolous appeal, because unpublished opinions are not to be considered of precedential value." Heaton v. Marin County Emp. Retirement Bd., Marin County (App. 1 Dist. 1976) 133 Cal.Rptr. 809, 63 C.App.3d 421.

13 -- Reliance, unpublished opinions

"Bankruptcy Court was precluded from considering unpublished opinions of California appellate court as precedent to determine how California court would rule on issue in bankruptcy case." In re Antablian, Bkrtcy. C.D.Cal.1992, 140 B.R. 534. CA ST MISC. Rule 977.

14 Federal Rules agree: FCL CT Rule 52.1. Unpublished Opinions:

Under Federal Law they are disfavored, although the U. S. Supreme Court reads and mentions them in its opinions.

(a) Citation unpublished opinions and orders of the court are binding on the parties, but have no precedential effect. Opinions and orders designated as unpublished shall not be employed as authority by this court and may not be cited by counsel as authority, except in support of a claim of res judicata, collateral estoppel or law of the case.

FCL CT Rule 52.1

15 Rule 36(c). Citation of Unpublished Dispositions:

In the absence of unusual circumstances, this Court will not cite an unpublished disposition in any of its published opinions or unpublished dispositions. Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. CTA4 Rule 36(c)

15.1 (a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action

or proceeding except as provided in subdivision (B) exceptions do not apply.

16 DIRECT AND CONCISE ARGUMENT Rule 14(h) In Bush v Gore, U.S. ----, 121 S.Ct. 512, --- L.Ed.2d ----, 2000 WL 1801819, the U S Supreme court recognized as against a state, the US Constitution mandates equal protection of the laws in Bush vs. Gore. Equal protection must be enforced. Otherwise there is an unconstitutional violation. The same argument applies we believe to California and its refusal to follow equal protection of the law, and instead used an unpublished opinion which California does not use against other California citizens, against only the petitioner here, thereby violating his constitutional right to equal protection of the law. And further took his property right in his $25,000 attorney fee from him. This was a retroactive taking, using an opinion decided one year after the attorney fee and property right of petitioner was set and awarded by using an entirely new formula for computing same which came from the said unpublished Lambert decision, a decision without notice to the Petitioner which took from him his property right in the said $25,000 attorney fee order.

17 Due process rights were not given Petitioner as are given or supposed to be given to California Citizens and US citizens. The fourteenth Amendment guarantees equal laws. US Mass 1979 USCAConstAmend. 14. Personnel Adm'r Mass v Feeney 99 S Ct 2282, 442 US 256, 60 LEd2d 870 remand, affirmed 100 S Ct 1075;

18 The trial court and Division 2 of the 2nd Appellate district of the Court of Appeal and the California Supreme Court ignore said enactments of said California legislature, and by so doing change the law Rule 977, as enacted in California by Judicial fiat in violation of law and the California Constitution -- and create a new body of law --at odds with existing decisions.

18.1 Even if the case cited by the Court had not been unpublished it could not be used against the $25,000 attorney

fee award of Petitioner since that award was final when the later opinion in Lambert was decided May 1999. Original order was May 12, 1998. And the lower court judge used the unpublished Lambert case May 10, 2000, two years later.

19 Using the unpublished Lambert opinion rendered the attorney fee result void. The Administrative law Judge Harvey Stark acted without jurisdiction to use such an opinion as the basis for changing the method of computing the attorney fee. California Supreme Court decision of Burnett v King (1949) 33 Cal2d 805, 807, 205 P2d 657. . . it has been repeatedly ruled that when a statute. . .requires a court to exercise its jurisdiction in a particular manner, follow a particular procedure, or subject to certain limitations, an act beyond those limits is in excess of jurisdiction.

19.1 WCJ and WCAB makes the court of appeal action in excess of its jurisdiction, since it cannot act without jurisdiction by approving a lower court ruling which violates stare decisis and bases it decision on an unpublished opinion as was done here. To say nothing about the refusal to afford the appellant a hearing of his motions, in attempting to correct these abuses at the trial level, violating his constitutional rights.

Retroactivity and Due Process, personal property.

Retroactive application of a statute may violate a party's due process rights if it deprives him or her of a vested property right without sufficient justification.

Case: In re Marriage of Barnes excerpt from: 43 Cal.3d 1371, *1372Supreme Court of California. Oct 29, 1987. As we noted in In re Marriage of Bouquet (1976) 16 Cal.3d 583 [128 Cal.Rptr. 427, 546 P.2d 1371], retroactive application of a statute may violate a party's due process rights if it deprives him or her of a vested property right without sufficient justification.

Case: In re Marriage of Barnes Excerpt from: 43 Cal.3d 1371, *1377

20 There must be a detriment. Here Petitioner can show such action was to his detriment. Blumenthal v. Di Giorgio

Fruit Corp. (App. 1 Dist. 1938) 30 Cal.App.2d 11, 85 P.2d 580. CA CONST Art. 1, s 7

21 Petitioner had a vested right in his $25,000 attorney fee award which under California law is a property right. California civil code § 663. Personal property defined: Every kind of property that is not real is personal. Case: Fuentes v. Shevin Excerpt from: 407 U.S. 67, 92 S.C. 1983. Fourteenth Amendment's protection of property does not safeguard only rights of undisputed ownership but extends to any significant property interest including statutory entitlements. U.S.C.A.Const. Amend. 14.

21.1 Respondent Schmidt violated the notice requirements of Cal Administrative Code Regulations, 10414, 10416.[4] Even though Respondent Schmidt had violated a statutory notice requirement, Judge Stark, the Court of Appeal, and the California Supreme Court ignored this taking from Petitioner of a Constitutional due process hearing. See Appendix EXHIBIT K Petitioner was cheated out of any hearing to contest the unconstitutional use of the unpublished opinion

22 Respondent, Mr. Schmidt, did not follow Rules of Practice and Procedure when he filed his position statement on attorney fees on May 12, 1999, not serving same on Petitioner. Petitioner did not receive a copy of the Motion: POSITION STATEMENT ON ATTORNEY FEES by lien claimant Schmidt until August 9, 1999, eighty-seven days after the fact, thereby precluding applicant the opportunity for filing an objection pursuant to the labor Code Section

23 The Court ignoring Petitioner's said rights ruled as stated in Appendix EXHIBIT V. Petitioner had been cheated out of proper procedural time to oppose his ex attorney Respondent Schmidt, claim for a fee lien in excess of the May 12, 1998 $25,000 fee order. Therefore they, former attorney Schmidt, Judge Stark, The Appellate Court, The California

---

[4]Cal Administrative Code Title 8, Reg 10414, 10416, Cal Labor Code 134, Cited in EXHIBIT L, J, K and M.

Supreme Court, all joined together as a matter of fact to deprive the Petitioner not only of his Due Process rights but his property right in the original $25,000 attorney fee ordered on May 12, 1998

24 Due process requires reasonable notice to parties before action is taken to deprive them of property. U.S.C.A. Const. Amend. 14. Case: Zmuda v. C.I.R. Excerpt from: 731 F.2d 1417

24.1 Petitioner got no reasonable notice. Petitioner asked for a continuance, so that he could have his motions heard and be prepared to argue the unconstitutional use of the said unpublished opinion. Petitioner's request for a continuance in Appendix EXHIBIT O page 26, and Court denial Page 27.

24.2 Promptly after the continuance denial, Petitioner filed his motions, Appendix EXHIBIT J motion to reduce or disallow attorney fees, judge using (unpublished non-citable) opinion of Lambert, Appendix EXHIBIT K motion to quash lien claimant's position statement on attorney fees, Appendix EXHIBIT L motion to quash points and authorities in support of lien for attorney fees, none of which were heard or ruled on in violation of his right to due process, the 14th amendment and a fair hearing.

Petitioner was without counsel having had to fire Respondent Schmidt discovering he had been working against him, and believed the judge was going to re-figure the attorney fee award, and ignore the 5/12/98 award. In truth and fact the judge did that, using a new opinion an unpublished opinion. See Appendix EXHIBIT P where the unpublished unconstitutional use of the Lambert opinion by the judge re-computed the attorney fee award. No time for hearing on that use was given to the Petitioner. Later the court issued another document MAY 30, 2000 admitting it had relied on the unpublished opinion of Earl Lambert See Appendix EXHIBIT V P2 last paragraph: "in determining the reasonable attorney fee of Mr. Schmidt I relied on the case of Earl Lambert v WCAB (May 1999) 64CCC 627. In that unpublished opinion

it expressly stated at the heading that it could not be cited as authority, Cal Ct Rule 977: "Publication status: Opinion not published in official reports and therefore not citable in judicial actions or proceedings. See Cal Rules of Ct. Rule 977."

25 Taking of property without due process of law is a separate constitutional violation of which the respondent trial judge and court and the court of appeals and the California supreme court are guilty: Procedural Due Process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due process clause of the Fifth and Fourteenth Amendment USCAConstAmends 5,14 Dash Inc. v Alcoholic Beverage Control Appeals Bd 683 F2d 1229;

26 The Petitioner should have had a hearing confirmed also by the U S Supreme Court:

Federal law including U.S. Supreme Court. Saunders v Shaw (1917)37 Sup Ct 638,. . . ,He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefitted, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. Case: Saunders v. Shaw Excerpt from: 244 U.S. 317, *319, 37 S.Ct. 638, **639

The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance. The denial of rights given by the 14th Amendment need not be by legislation. Home Teleph. &

Teleg. Co. v. Los Angeles, 227 U. S. 278, 57 L. ed. 510, 33 Sup. Ct. Rep. 312. It appears that shortly after the supreme court had declined to entertain the petition for rehearing the plaintiff in error brought the claim of constitutional right to the attention of the chief justice of the state by his assignment of errors. We do not see what more he could have done.

Judgment reversed.

Case: Saunders v. Shaw

Excerpt from: 244 U.S. 317, *320, 37 S.Ct. 638, **640& Lyydikainen v Ind Acc Comp. (1939) 36 CalApp2d 298;the showing was made that the notice had been delayed in reaching petitioner. A bona fide, if not a strictly legalistic, showing, designed to excuse failure to come in within the ten days, was made. It cannot very well be held to be a waiver when a petitioner thus seeks to bring before the commission the reason why he has not appeared sooner. To hold that there was a waiver would mean that the petitioner had voluntarily relinquished his right to object to the failure to give him legal notice, and there is nothing in his petition to suggest this.

For the reasons herein given we are satisfied that the notice required by law was not given to the petitioner in the proceedings now under review. That view renders it unnecessary to discuss other points urged by the petitioner.

The award is annulled.

Peters, P. J., and Ward, J., concurred. *306

Cal.App.1.Dist.,1939.

Case: Lyydikainen v. Industrial Acc. Commission

Excerpt from: 36 Cal.App.2d 298, *305 to 36 Cal.App.2d 298, *306

Whether also Federal Constitutional law was violated: Zmuda v C.I.R. 731 F2s 1417 C.A.9 1984 Due Process requires reasonable notice to parties before action is taken to deprive them of property. USCAConstAmend 5, 14.

26.1 There was no amendment by the California Legislature

to the Labor Code attorney fees computation statute. The law says Petitioner can complain: Due process clause may be invoked to insure that state-created right is not arbitrarily abrogated. People v. Sutton (App. 3 Dist. 1993) 23 Cal.Rptr.2d 632, 19 Cal.App.4th 795.

27 IN CONCLUSION

US Supreme Court Saunders v Shaw (1917) 37Sup Ct 638 holds that an appeals court can by its own acts violate the due process rights of an appellant, and Lyydikainen v Ind Acc Comp. (1939) 36 CalApp2d 298; cannot be ignored due to the doctrine of stare decisis, or any other doctrine. CA CONST 1849 Art. 1, s 8.

28 The Lambert case, unpublished opinion, mandated that the award of attorney fees be based on the full present value of applicant's award. A change in the statute for computing attorney fees actually violated the separation of powers doctrine.

28.1 a) The California court system has a constitutionally established independence under the judicial and separation of power clauses of the State Constitution. CA PENAL s 13830 § 3. Enumeration; exercise, Sec. 3. The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution. CA CONST Art. 3, s 3

29 This means that Petitioner was treated differently than any other California Citizen in not being afforded the protections of not having an unpublished opinion, used against him, like all other California Citizens have. The law for formulating and computing attorney fees under the California Workmen's Compensation statute was not used for the Petitioner. No, he got a special unconstitutional Rule the use of a new formula created by judicial fiat based on non-authority that is the non citable Unpublished opinion in the case of Earl Lambert v WCAB (May 1999) 64CCC 627.

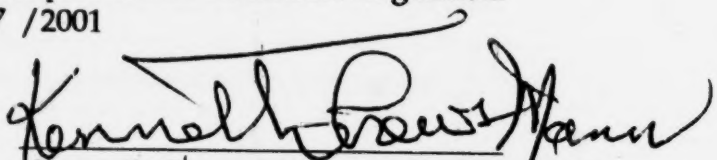
29.1 Judge Harvey Stark does not anywhere in any of his rulings mention that the Lambert case is not citable authority

because unpublished. That taking of the property right from Petitioner was for a public purpose, that of modifying the statute by judicial fiat for assessing attorney fees under Workmen's Compensation laws. This taking allowed the public assessment of attorney fees in workmen's compensation cases to be modified, with a new formula now a part of a new law, by judicial not legislative action. A new law obtained by judicial fiat, by use of an unpublished opinion in violation of California due process and California law Ct Rule 977, unpublished opinions cannot be relied on for authority. A violation of the United States Equal Protection clause of the 14th amendment. The law says Petitioner can complain since the Due process clause may be invoked to insure that state-created right is not arbitrarily abrogated. People v. Sutton 2 (App. 3 Dist. 1993) 23 Cal.Rptr.2d 632, 19 Cal.App.4th 795. CA CONST Art. 1, s 15, cl. 7 Courts § and the-Doctrine of Stare Decisis--Unpublished. Each Court hearing the constitutional complaints of Petitioner, including the WCJ and WCAB, California Appellate Court and California Supreme Court ignored them.

30 To let the opinion stand and worse yet stand unpublished is to allow one Court of Appeal 2nd Appellate District to cancel existing California law as to Separation of powers, Due Process, Equal Protection and act without jurisdiction and in effect create a separate hidden body of unconstitutional law. Whereas under these facts such an odd opinion is at odds with the body of California and Federal Constitutional law.

31 Let the petition for Certiorari be granted.

Dated: 1/27 /2001



Kenneth Crews Mann, Attorney for Petitioner, a member of the bar of this Court.

APPENDIX index

	EXHIBIT
IN THE SUPREME COURT OF CALIFORNIA En Banc 11/15/2000 denial of petition	1
Excerpts from Petition	1A
Two No. B143509 S092126 Court of Appeal Second Review Denied October 2, 2000	2
Excerpts from Writ of Review	X
State of California Workers Compensation Appeals Board, Case No. VNO 303858 5/12/1998 order	C
UNPUBLISHED NON CITABLE OPINION Earl Lambert Petitioner v Worker's Compensation Appeals Board May 19, 1999	C1
Motion reduce disallow attorney fees	J
Motion to Quash Lien	K
Motion to Quash Points and Authorities	L
Motion for contempt	M
Transcript request for continuance denied	O
Findings award for attorney fees	P
Report and recommendations on petition for reconsideration	V

Appeal Second Appellate District Division Two No. B143509 S092126

IN THE SUPREME COURT OF CALIFORNIA

En Banc

Supreme Court Filed
Nov 15, 2000
Frederick K. Ohirich Clerk

Deputy

Charles E. Duncan Petitioner

v.

Workers Compensation Appeals Board, Respondent

==========

Petition for review denied
s/George

Chief Justice

EXHIBIT 1

In the Supreme Court of California
Charles E. Duncan Jr. Appellant/Petitioner
Worker's Compensation Appeals Board
10/11/2000
Steve Schmidt Respondents
. . . .P8 A taking of property without due process of law is a separate constitutional violation of which the respondent trial judge and board and court of appeals is guilty. . . P9 USCA Amend 14 No adequate notice violates due process. . .P 10 Citation of unpublished opinion Violates equal protection of the laws Cal Rul Ct 977, R& P Capital Resources Inc v California State Lottery App3 Dist 1995 37 Cal Rptr 2d 436,. . .P 11 CA9 1984 USCA ConstAmend14 Zmuda v C.I.R. 731 F2d 1417. The Fourteenth amendment guarantees equal laws.

. . .

33.1 . . . Rule 977. Citation of opinions
(a) [Unpublished opinions] An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding . . . . (b) [Exceptions] . . . NOT APPLICABLE.

Let the petition for review be granted.

DATED: 10/11/2000 s/ Charles E,. Duncan, Jr.
Petitioner in Pro Per

EXHIBIT 1A

EXHIBIT -21-

Court of Appeal Second Appellate District Division Two No. B143509 S092126

Charles E. Duncan Petitioner
v.

Workers Compensation Appeals Board, et al Respondent
==========

Petition for hearing denied
October 2, 2000 order

EXHIBIT 2

In the Court of Appeal Second Appellate District Division Two
No. B143509 S092126
Ct of Appeal # B143509
Charles E. Duncan Petitioner Filed 8/13/2000
v.
Workers Compensation Appeals Board, et al Respondent
==========

For writ of review For hearing

. . . P4 L 13 Unless action is taken by respondent board is annulled petitioner will be deprived of his property without due process of law in violation of Sec 4 Article XIV and Sec 1 Article III of the Constitution of the State of California and in violation of Sec 1 of the Fourteenth Amendment to the Constitution of the United States of America, and petitioner claims the benefit and protection of these provisions.. . .

. . . .

EXHIBIT X

State of California Workers Compensation Appeals Board
Case No. VNO 303858

Charles Duncan
Applicant

vs.

Zenith Insurance Company

Findings and Award
And
Order of Commutation

Steve Schmidt
Attorney for Applicant

* * * * * *

. .The Honorable Harvey Stark, referee finds, awards and orders as follows:

Findings of Fact

1. Charles Duncan born May 16, 1943, while employed as a carpet installer, . .insured for worker's compensation. .. . sustained an injury arising out of and occurring in the course of employment to his neck and psyche.
2. At the time of injury applicant's earnings were maximum.
3. The injury caused permanent disability of 100%, payable at the rate of $336.00 per week for life.
4. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury.
5. Applicant's attorney rendered services of the reasonable value of $25,000, which shall be commuted from the far end of the award.

AWARD

Award is made in favor of Charles Duncan against Zenith Insurance Company of permanent disability indemnity in accordance with findings 3 above, less $25,000 payable to Steve Schmidt as attorney fees; together with further medical treatment. exhibit C

ORDER

It is ordered that all future remaining payments of permanent disability due be reduced by commutation to produce the sum of $25,000, paid forthwith to Steve Schmidt as reasonable attorney fees.

. . . opinion on decision

. . . Applicant's attorney is allowed a reasonable fee of $25,000 which is ordered commutted and paid in one lump sum from the far end of the award to Steve Schmidt. Commutation of the $25,000 attorney fee reduces weekly payments to applicant to $303.66 as of May 18, 1998.

S/_____
Harvey Stark
Referee

Filed and served by mail
on May 12, 1998
by S/Sherry Williams, EXHIBIT C

May 1999 Supreme and Appellate Court opinions 637
Earl Lambert Petitioner v Worker's Compensation Appeals Board. . .State Compensation Insurance Fund Respondent. Civil No Bi23621 Court of Appeal Second Appellate District Division five 64 Cal Comp Cases 637 May 19, 1999.

PUBLICATION STATUS: Opinion not published in official reports and therefore not citable in judicial actions or proceedings See Cal Rule of Ct. Rule 977

. . . Attorney's fees When WCAB awarded applicant permanent total disability for life and awarded applicant's fee based on .....weeks of permanent disability and Goler v W&J Sloane Co, Court of appeal annulled award and remanded for WCAB to award labor Code § 4906(d) attorney's fee considering full present value of applicant's permanent disability award. . .We conclude that the full discounted value of award should be taken into account in computing the attorney's fee award. . .

EXHIBIT C1

Workers Compensation Appeals Board, County of Los Angeles

Charles Duncan
Applicant
vs.

JIM'S Carpet
Zenith Ins
Defendants.
exhibit J

Case No. VNO 303853

Motion to reduce or Disallow Attorney Fees

4/27/2000

. . .P 10 L 25 Concerning the Court of Appeals establishing a new dictum on 5/19/99 in Lambert vs. Portillo 63CCC637. Lien Claimants (Petitioner's) award was given on 5/12/98 one year before the Lambert opinion was established. .P11 L1

EXHIBIT J

WORKER'S COMPENSATION APPEALS BOARD, COUNTY OF LOS ANGELES
CHARLES DUNCAN
Applicant
vs.
Jim's Carpet etc. et al

Motion to Quash Lien Claimant's Position Statement on Attorney Fees
4/27/2000

. . .Arguments: Applicant argues that he did not receive a copy of the Motion POSITION STATEMENT ON ATTORNEY FEES, by lien claimant until August 9, 1999 eighty seven days after the fact, and thereby precluding applicant the opportunity for filing an objection pursuant to the labor Code Section 10416.

EXHIBIT K

WORKER'S COMPENSATION APPEALS BOARD,
COUNTY OF LOS ANGELES

CHARLES DUNCAN
Applicant

vs.
Jim's Carpet etc., et al
Defendants

WCAB Case No. VNO 303858
Motion to Quash Points and Authorities in support of Lien for Attorney fees
4/27/2000

. . Applicant contends that Mr. Schmidt failed to follow the Rules of Practice and Procedure when he filed his position statement on attorney fees with the WCAB on May 12, 1999, and received by Applicant on August 9, 1999. . .

EXHIBIT L

WORKER'S COMPENSATION APPEALS BOARD, COUNTY OF LOS ANGELES

Charles Duncan,
Applicant,

vs.
Jim's Carpet etc., et al

WCAB Case No VNO 303858
MOTION FOR CONTEMPT
4/27/2000

. . . Applicant further argues that contained within Labor Code section 10414, & 10416 it states the following: **"A false declaration or certification by an attorney or representative may give rise to proceedings under Labor Coder Section 134 for contempt."**

EXHIBIT M

State of California Dept of Industrial Relations Divisions of Worker's Compensation Worker's Compensation Appeals Board

Case No. VNO 303858
Certified copy of
Transcript of hearing
Of 4/27/2000

Duncan
Applicant
vs
Jim's Carpet etc et al
Defendants.

. . . P 26 L 7 Mr. Duncan: I would request at this time that I be allowed a continuance so I can get a transcript of proceedings so I can properly prepare my rebuttal because I'm not sure of. . I would like to address a lot of these issues. . . . P26 L 25, P 27 L1 Mr. Duncan's motion for a continuance is denied.

EXHIBIT O

State of California
Workers Compensation Appeals Board

Case No. VNO 303858

Charles Duncan,
Applicant

FINDINGS AND AWARD
ON ATTORNEY'S FEE

vs
Jim's Carpet Service
Zenith Insurance Co
Defendant

An application having been filed herein all parties having appeared. .Honorable Harvey Stark, Worker's Compensation Administrative Law Judge, finds and orders as follows:
FINDINGS OF FACT . .a Reasonable attorney fee is $31,0000
Order : Zenith Insurance Company is hereby ordered to pay Steve Schmidt $31,000 from applicant's recovery and shall be commutted and paid in one lump sum.

s/Harvey Stark
WC administrative law judge
Filed and served by mail. . .
on May 10, 2000 By s/FG Sapinon

Opinion on Decision Case No VNO 303858

Duncan v Jim's Carpet etc. et al
Applicant's former attorney Steve Schmidt has requested an attorney fee of $37,230. Applicant in pro per. .objected. The Court must now determine what amount should be awarded. . . . .Findings and award initially issued on September 9, 1998 awarding applicant 100% P D plus further medical treatment. Applicant's attorney Steve Schmidt was awarded reasonable attorney fees of $25,000. Defendant Timely petitioned for reconsideration and the WCAB rescinded the entire award and returned the matter back to the trial level for additional evidence and decision. . . . . **Prior to the case of Earl Lambert vs WCAB (May 1999) 64 CCC 637 fees were awarded based on 621.25 weeks of PD in 100% disability cases. However that case mandates that the award of attorney fee be based on the full present value of applicant's award. The full present value of applicant's award is approximately $248,000.**

I determine the reasonable attorney fee to be 12,5% of $248,000 or $31,000.The sum of $31,000 is ordered Commuted from applicant's award and paid in one lump sum to Mr. Schmidt as reasonable attorney fee.

S/Harvey Stark
WC Administrative Law Judge
Filed and served by mail May 10, 2000
by s/FG Sapinon

EXHIBIT P

Report and Recommendation on Petitions for reconsideration

Case No VNO 303858
Duncan 5/31/2000
Applicant
vs.

Jim's Carpet etc, et al
Defendants
. .Page 2 last paragraph:
"in determining the reasonable attorney fee of Mr. Schmidt I relied on the case of Earl Lambert v WCAB (May 1999) 64CCC 627. This case mandates that the award of attorney fees be based on the full present value of applicant's award.

S/Harvey Stark
Administrative Law Judge

EXHIBIT V